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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re KidVid, Inc.

Serial No. 78/032,155

Lee B. Beitchman, of Beitchman & Hudson for KidVid, Inc.

Michael Webster, Trademark Examining Attorney, Law Office 102
(Tom Shaw, Managing Attorney).

Before Simms, Hohein and Bottorff, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

KidVid, Inc. has filed an application to register the mark "BABY BLOOPERS" on the Principal Register for "prerecorded videotapes, audio cassettes, compact discs, and digital video discs all featuring educational materials for the purpose of improving the creative and intellectual faculties of infants and children."¹

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the

¹ Ser. No. 78/032,155, filed on October 24, 2000, which alleges a bona fide intention to use such mark in commerce.

ground that, when used in connection with applicant's goods, the mark "BABY BLOOPERS" is merely descriptive of them. Registration also has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that, when used in connection with its goods, applicant's mark so resembles the mark "BLOOPERS," which is registered on the Supplemental Register for "entertainment [services] in the nature of on-going television programs in the field of comedy, variety, short out-takes and skits,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusals to register.

Turning first to the refusal to register on the ground of mere descriptiveness, since the disposition thereof, and thus a determination of the strength or weakness of applicant's mark, obviously has a bearing on whether it is confusingly similar to the cited mark, applicant contends that its "BABY BLOOPERS" mark is suggestive of its goods, which it stresses are identified as "featuring educational materials for the purpose of improving the creative and intellectual faculties of infants and children." In particular, applicant "asserts ... that consumers coming upon the mark would not perceive the goods to be a videotape intended to enhance their child's intellectual and creative skills and[,]
therefore, the mark can only be classified as suggestive."

² Reg. No. 2,466,773, issued on July 3, 2001, which sets forth a date of first use anywhere and in commerce of January 31, 1998.

The Examining Attorney, citing the definitions of record from The American Heritage Dictionary of the English Language (3d ed. 1992), which in relevant part list "baby" as "[a] very young child; an infant" and define "blooper" as "[a] clumsy mistake, especially one made in public; a faux pas," argues that applicant's "BABY BLOOPERS" mark immediately signifies "a clumsy mistake performed by a child or infant." In view thereof, the Examining Attorney maintains that "the applicant's mark immediately identifies to the prospective consumer the subject matter of the [applicant's] goods." As further support therefor, the Examining Attorney insists that the U.S. Patent & Trademark Office "has consistently held the term[s] 'BABY' and 'BLOOPERS' descriptive of goods or services where the terms identify the subject matter" thereof, as shown by the copies of record of third-party registrations in which either the term "BABY" has been disclaimed when part of a mark registered on the Principal Register or the term "BLOOPERS" constitutes or is part of a mark registered on the Supplemental Register.

In addition, we note that the record contains various printouts of Internet webpages, listings of Internet websites and excerpts from the "NEXIS" database, all of which were submitted (even though many instances are duplicates of the same stories) as evidence to demonstrate the mere descriptiveness of the term "baby bloopers." The two most pertinent examples thereof are set forth below (emphasis added):

"8 p.m. ET/PT Premiere of Uh Oh! **Baby Bloopers** Watch real parents' home videos of their kids' laughable antics Hosted by

pediatrician Andrea Pennington, M.D., Discovery Health's medical director and spokesperson. Between the chuckles she'll provide helpful tips on good parenting and child development." -- discoveryhealth.com, July 22, 2002; and

"The debut edition of [VH1's music video series] 'Radical Recut' presents Foo Fighters' 'Learn to Fly' spliced with aviation mishaps footage, Britney Spears' 'Baby One More Time' laced with home video **baby bloopers**" -- entertainmentnews-daily.com, November 13, 1999.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See In re Bright-Crest, Ltd., 204 USPQ 591,

593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985). However, it is also well established that the determination of mere descriptiveness must be decided on the basis of the identification of goods or services as set forth in the application. See, e.g., In re Allen Electric & Equipment Co., 458 F.2d 1404, 173 USPQ 689, 690 (CCPA 1972).

In the present case, applicant's goods are identified as "prerecorded videotapes, audio cassettes, compact discs, and digital video discs all featuring educational materials for the purpose of improving the creative and intellectual faculties of infants and children." Applicant, in response to a request for information by the originally assigned Examining Attorney which required that it *"specifically indicate if the applicant's goods feature bloopers made by babies and/or feature instruction on how to correct infant errors"* (italics in original), stated that:

The applicant has not yet completed development of the products for which this application has been made and therefore does not have either finished product or product literature to furnish to the examiner. The product will be VHS video tapes, audio cassettes (sound only) and digital video discs featuring infants and children performing various playful activities in a playground environment. They will contain the sounds of the children and added music performances as well as scenes featuring animals and other animate and inanimate objects. The products are designed to be sold to the parents of children for the purpose of increasing their child's educational capacities. The mark is not descriptive of the product[s] insofar as ... the definition of "blooper" appearing in

the Office Action does not comport with the content of the product[s].

Finding that applicant had "failed to submit sufficient additional information to permit a determination as to whether all or part of the mark is descriptive" as required by the original Examining Attorney, such requirement was maintained by a second Examining Attorney who was subsequently assigned to review the application. Applicant, in response thereto, advised that:

Applicant now has the ability to comply with the ... request for additional information and hereby submits a videotape featuring several scenes intended for inclusion in the final goods. As can be seen from the enclosed videotape, these scenes can hardly be classified as "bloopers" inasmuch as they are not out-takes or mistakes from previous filmed programs as is the common interpretation of this coined word. Rather, they are scenes designed to impart educational experiences for infants and children, for which applicant's educational advisors have generally indicated to applicant may be of some beneficial effect to the intellectual and cognitive functions of the infant and child viewers.

However, the second Examining Attorney, after watching such scenes, was of a contrary view, stating with respect to the ground of mere descriptiveness in the final refusal that "[t]he video tape submitted by the applicant features a montage of short out-takes of different infants or young children performing cute and funny tasks."

Unfortunately, we are not able to view applicant's sample videotape ourselves because, as the third and currently assigned Examining Attorney confesses in his brief, "applicant's tape ... was not transferred to the new examining attorney." Nonetheless, he repeated and relies upon the above-noted

statement by the immediately preceding Examining Attorney and applicant, we observe, failed to file a reply brief challenging such statement, just as it did not take issue therewith in its initial brief. Accordingly, we take it as established by the record that applicant's goods, although "featuring educational materials for the purpose of improving the creative and intellectual faculties of infants and children," nevertheless include as a significant feature thereof "a montage of short out-takes of different infants or young children performing cute and funny tasks." Furthermore, we note that it is reasonable to regard such out-takes as including amateur home videos or other not previously broadcast scenes of clumsy mistakes or bloopers by infants and young children inasmuch as applicant, as indicated above, argued only that the sample scenes for its goods were not "bloopers" in the sense of their being "out-takes or mistakes from *previous filmed programs* as is the common interpretation of this coined word" (*italics added*).

Based upon the arguments and evidence presented, it is plainly the case that the mark "BABY BLOOPERS" merely describes, as contended by the Examining Attorney, the principal subject matter featured in applicant's goods. Nothing in such mark is ambiguous or incongruous when considered in relation to applicant's "prerecorded videotapes, audio cassettes, compact discs, and digital video discs." Consequently, no imagination, cogitation or gathering of further information would be necessary in order for customers to perceive precisely the merely descriptive significance of the mark "BABY BLOOPERS." Such mark

immediately describes, without the need for conjecture or speculation, that a significant characteristic or feature of applicant's goods is that they feature short, cute and funny out-takes of infants or very young children performing clumsy mistakes, which subject matter is more commonly referred to simply as "baby bloopers." The fact that applicant's goods also feature educational materials for the purpose of improving the creative and intellectual faculties of infants and children, in that the scenes of baby bloopers are designed to impart educational experiences for infants and children viewing the content of applicant's goods, does not detract or otherwise diminish the merely descriptive significance which the mark "BABY BLOOPERS" forthwith conveys as to the subject matter of applicant's goods.

With respect to the remaining issue in this appeal, our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and/or services and the similarity of the marks.³

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks."

Turning first to consideration of the respective goods and services, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods and services as they are set forth in the involved application and the cited registration, and not in light of what such goods and services are shown or asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where applicant's goods and registrant's services are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods and services of the nature and type described therein, but that the identified goods and services move in all channels of trade which would be normal for those goods and services, and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Moreover, it is well established that applicant's goods need not be identical or even competitive in nature with registrant's services in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods and services are related in some manner and/or that the circumstances

surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Applicant contends that the goods and services involved in this appeal are so different that there could be no likelihood of confusion. In particular, applicant asserts that "there is little likelihood" that registrant's television programs in the field of comedy, variety, short out-takes and skits, even "if turned into product[s], will be available at your local baby goods or toy store such as is the case with [the goods of] applicant." According to applicant, each of its products "is sold to parents and grandparents and appears with, or in close physical proximity to[,] baby products."

The Examining Attorney, on the other hand, maintains that applicant's goods and registrant's services are sufficiently related in a commercial sense that, if offered under the same or sufficiently similar mark, confusion as to the source or sponsorship thereof is likely to occur. Here, we observe, it is plain that applicant's "prerecorded videotapes, audio cassettes, compact discs, and digital video discs," even though specifically identified in its application as "featuring educational materials for the purpose of improving the creative and intellectual

faculties of infants and children," are nonetheless not limited to any particular channels of trade or classes of purchasers. Thus, they must be considered as suitable for sale in such customary channels of trade as retail video stores, record shops and mass merchandisers where, it is common knowledge, prerecorded videotapes, audio cassettes, compact discs and digital video discs of a wide variety of broadcast television programs are also sold. It is also the case that applicant's goods, like registrant's entertainment services in the nature of on-going television programs, must be considered as directed at a wide ranging audience of ordinary consumers, including parents and grandparents of infants and young children.

Moreover, as the Examining Attorney points out in his brief, "[c]onsumers are ... accustomed to a single source for videotapes and television programs of the same subject matter." In support of such proposition, the Examining Attorney notes that the record contains copies of "15 U.S. Registrations from a total of 290 on the Register in which the same mark is used relative to television programs and videotapes featuring the same program." It is settled, in this regard, that while use-based third-party registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, such registrations may nevertheless have some probative value to the extent that they serve to suggest that the goods and services listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc.,

6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Here, the copies of the registrations referred to by the Examining Attorney show not only that they are based on use, but in each instance they include, respectively, such goods as "prerecorded audio and video tapes featuring interviews conducted and news stories reported by youths ages 8-18" or "prerecorded video tapes featuring educational information on children," on the one hand, and services such as "ongoing television ... programs in the fields of youth journalism and social issues affecting youths ages 8-18" or "on-going television programs ... in the field of child raising," on the other.

In view thereof, and since, as the Examining Attorney observes, the goods and services at issue herein both (i) feature as their subject matter "clips of funny real-life situations" involving clumsy mistakes or bloopers, including those by babies, and (ii) are directed at the same classes of ordinary consumers, such as parents and grandparents of infants, we agree with the Examining Attorney that applicant's goods and registrant's services are sufficiently related that, if provided under the same or similar marks, consumers thereof would be likely to attribute a common origin or affiliation to the respective goods and services. This brings us, therefore, to consideration of the marks at issue.

Applicant chiefly argues that "[t]here is no per se rule that for certain goods or services that are related that there must be a likelihood of confusion from the use of similar

or identical marks" in connection therewith.⁴ This appeal, however, differs from the cases cited by applicant as support for its argument inasmuch the latter involved marks which were found to have different connotations because of the respective goods with which the marks were associated.⁵ Here, by contrast, the presence of the term "BABY" in applicant's "BABY BLOOPERS" mark does not give such mark a sufficiently different connotation from registrant's "BLOOPERS" mark. Instead, as pointed out by the Examining Attorney, "[t]he term 'BABY' is a highly descriptive term clearly identifying the subject matter or purpose of the goods, namely, infants." Thus, when considered in their entirety, it is readily apparent that the word "BABY" is insufficient to distinguish applicant's "BABY BLOOPERS" mark from registrant's "BLOOPERS" mark, given that such marks are

⁴ Applicant, in its brief, sets forth a list of various third-party registrations which, it maintains, "evidence ... the issuance of ... identical or nearly identical marks for registration, even where the categories of goods and services are arguably related." While applicant asserts that such evidence "justifies applicant's position that ... [it is] entitled to registration," it is pointed out that, not only is a mere listing of information concerning third-party registrations insufficient to make them of record, see, e.g., In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974), but in any event the evidence applicant seeks to rely on is untimely under Trademark Rule 2.142(d) since it was furnished for the first time with applicant's brief. Irrespective thereof, suffice it to say that each case must be determined on its own merits. See, e.g., In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the ... allowance of such prior registrations does not bind the Board or this court"].

⁵ See, e.g., In re Sears, Roebuck & Co., 2 USPQ2d 1312, 1314-15 (TTAB 1987) [mark "CROSS-OVER for bras held not likely to cause confusion with mark "CROSSOVER" for ladies' sportswear]; In re British Bulldog, Ltd., 224 USPQ 854, 856 (TTAB 1984) [mark "PLAYERS" for men's underwear found not likely to cause confusion with mark "PLAYERS" for shoes]; and In re Sydel Lingerie Co., Inc., 197 USPQ 629, 630 (TTAB 1997) [mark "BOTTOMS UP for ladies' and children's underwear held not likely to cause confusion with mark "BOTTOMS UP" for men's suits, coats and trousers].

substantially similar in sound, appearance, connotation and commercial impression.

Nonetheless, applicant insists that "the term 'baby' is a very important part of applicant's mark, and goes a long way to differentiating the marks as perceived by consumers" because, according to applicant, its "BABY BLOOPERS" mark is part of a "family of marks by applicant featuring 'baby' as a critical identifier of applicant's goods." Such a family, applicant asserts, includes its registered marks "BABY'S FIRST IMPRESSIONS," "BRILLANT BABY," "BILINGUAL BABY," "BIBLE BABIES," "BABY GRAND" and "BRIGHTER BABY." However, as stated in *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991), a case cited by both applicant and the Examining Attorney:

A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.

Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family. It is thus necessary to consider the use, advertisement, and distinctiveness of the marks, including assessment of the contribution of the common feature to the recognition of the marks as of common origin.

The Examining Attorney, in view thereof, properly points out that "[a]pplicant's claim that it has developed a

family of marks containing the term 'BABY' identifying applicant's baby products is contrary to the definition of a 'family of marks' and virtually impossible" given the descriptiveness of the such term with respect to products for or otherwise pertaining to babies. Specifically, as explained in *Land-O-Nod Co. v. Paulison*, 220 USPQ 61, 65-66 (TTAB 1983), in order to establish the existence of a family of marks:

[I]t must be shown by competent evidence, first, that ... the marks containing the claimed "family" feature, or at least a substantial number of them, were used and promoted together ... in such a manner as to create public recognition coupled with an association of common origin predicated on the "family" feature; and second, that the "family" feature is distinctive (i.e., not descriptive or highly suggestive or so commonly used in the trade that it cannot function as a distinguishing feature of any party's mark).

Here, applicant has not submitted any evidence that it has promoted its marks together in such a way as to create a family of marks. The mere fact that applicant claims ownership of several registrations for marks which share the term "BABY" or its plural is alone an insufficient basis on which to predicate the existence of a family of marks. See, e.g., *Hester Industries, Inc. v. Tyson Foods, Inc.*, 2 USPQ2d 1646, 1647 (TTAB 1987); *Consolidated Foods Corp. v. Sherwood Medical Industries Inc.*, 177 USPQ 279, 282 (TTAB 1973); *Polaroid Corp. v. American Screen Process Equipment Co.*, 166 USPQ 151, 154 (TTAB 1970); and *Polaroid Corp. v. Richard Mfg. Co.*, 341 F.2d 150, 144 USPQ 419, 421 (CCPA 1965). Furthermore, the Examining Attorney is correct in noting that the "[t]erm 'BABY' is obviously not distinctive

for ... goods for infants and babies" and, thus, such term cannot form the basis for application of the family of marks doctrine.

Finally, and in any event, it is pointed out that the sole issue before us is whether the mark which applicant seeks to register so resembles the registrant's mark that, when used in connection with the respective goods and services, confusion is likely. Consequently, even if applicant were to demonstrate that it has established a family of marks characterized by the term "BABY," such would not aid or otherwise entitle applicant to the registration which it seeks. See, Baroid Drilling Fluids Inc. v. Sun Drilling Products, 24 USPQ2d 1048, 1052 (TTAB 1992); and In re Lar Mor Int'l, Inc., 221 USPQ 180, 183 (TTAB 1983).

Accordingly, we conclude that consumers, who are familiar or acquainted with registrant's mark "BLOOPERS" for "entertainment [services] in the nature of on-going television programs in the field of comedy, variety, short out-takes and skits," would be likely to believe, upon encountering applicant's mark "BABY BLOOPERS" for "prerecorded videotapes, audio cassettes, compact discs, and digital video discs all featuring educational materials for the purpose of improving the creative and intellectual faculties of infants and children," that such closely related services and goods emanate from, or are sponsored by or affiliated with, the same source. In particular, customers encountering applicant's "BABY BLOOPERS" goods are likely to regard such products as a compilation of portions from registrant's "BLOOPERS" television programs in the field of comedy, variety, short out-takes and skits which are devoted to

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the antics of babies as the principal topic or subject matter thereof.

Decision: The refusals to register under Sections 2(e)(1) and 2(d) are affirmed.